STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2014
v	No. 318040 Huron Circuit Court
RYAN SCOTT WELSHANS, Defendant-Appellant.	LC No. 13-305664-FH

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, Ryan Scott Welshans was found guilty of operating or maintaining a controlled substance laboratory involving methamphetamine,[1] operating or maintaining a controlled substance laboratory near a residence,[2] manufacture of methamphetamine,[3] possession of methamphetamine,[4] and maintaining a drug house.[5] Welshans was sentenced, as a fourth habitual offender,[6] to 6 to 30 years' imprisonment for operating or maintaining a controlled substance laboratory involving methamphetamine, 6 to 25 years' imprisonment for operating or maintaining a controlled substance laboratory near a residence and manufacture of methamphetamine, 3 to 20 years' imprisonment for possessing methamphetamine, and 2 to 15 years' imprisonment for maintaining a drug house. Welshans appeals as of right. We affirm Welshans's convictions, but remand for further proceedings regarding sentencing.

I. SUFFICIENCY OF THE EVIDENCE

[1] MCL 333.7401c(2)(f).

[2] MCL 333.7401c(2)(d).

[3] MCL 333.7401(2)(b)(*i*).

[4] MCL 333.7403(2)(b)(*i*).

[5] MCL 333.7405(d).

[6] MCL 769.12.

Welshans first argues that there was insufficient evidence to sustain his conviction for possession of methamphetamine. We disagree. When examining whether there was sufficient evidence to support a conviction, we review the evidence de novo in a light most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt."[7]

Due process requires that the prosecution in a criminal case introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt.[8] "The question is whether the evidence presented at trial, together with all reasonable inferences arising therefrom, was sufficient to allow a rational trier of fact to find each element of the crime proven beyond a reasonable doubt."[9] In reviewing the sufficiency of the evidence, this Court must not interfere with the role of the trier of fact in determining " 'the weight of the evidence or the credibility of witnesses.' "[10] Furthermore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."[11] " 'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.' "[12]

In this case, one of prosecution's theories was that Welshans aided and abetted Ronald Hartman in the manufacture of methamphetamine. A person who "procures, counsels, aids, or abets in" the commission of an offense may "be punished as if he had directly committed such offense."[13] To establish that a defendant aided and abetted an offense, the prosecutor must demonstrate the following:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement."[14]

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[7] *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

[8] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[9] *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

[10] *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012), quoting *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

[11] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

[12] *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

[13] MCL 767.39.

[14] *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (alteration in original; quotation omitted).

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime."[15] However, "the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime."[16]

Possession of methamphetamine is proscribed by MCL 333.7403, which provides in pertinent part as follows:

> (1) A person shall not knowingly or intentionally possess a controlled substance . . . .
>
> (2) A person who violates this section as to:
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> * * *
>
> (b) Either of the following:
>
> (*i*) A substance described in section 7212(1)(h) or 7214(c)(*ii*) is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00, or both.[17]

MCL 333.7214(c)(*ii*) includes as a "schedule 2" controlled substance: "Any substance which contains any quantity of methamphetamine, including its salts, stereoisomers, and salts of stereoisomers."

Welshans does not dispute that methamphetamine was being made in Hartman's bedroom. He contends, however, that he could not have been guilty of possession of methamphetamine for two reasons. First, he argues that the evidence showed that Hartman "used all the meth he made" and consequently that he never actually possessed any methamphetamine. In the same vein, he also calls attention to the fact that no methamphetamine was found by police. However, even if Welshans never directly possessed any methamphetamine, this argument does not negate his culpability as an aider and abettor.

Welshans argues that although there was evidence that he helped Hartman manufacture methamphetamine by procuring ingredients and mixing them, this was relevant to show "that he assisted with the meth operation," not that he possessed methamphetamine. He asserts that there was no evidence that he "ever possessed or assisted anyone else with possessing the actual finished product of methamphetamine . . . ." The making of the methamphetamine, however, would have resulted in the possession of methamphetamine. Thus, to the extent that Welshans helped make the methamphetamine, he necessarily helped Hartman possess it. That is, Welshans

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[15] *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

[16] *Moore*, 470 Mich at 71.

[17] Footnote omitted.

helped Hartman manufacture methamphetamine and consequently possess it. Accordingly, the evidence was sufficient to find him guilty of possession as an aider and abettor.

II. DOUBLE JEOPARDY

Welshans next argues that two sets of his convictions violated his right against double jeopardy. We disagree. We review this unpreserved issue for plain error affecting Welshans's substantial rights.[18]

The Fifth Amendment to the United States Constitution and Article I, § 15 of the Michigan Constitution provide that a criminal defendant "may not be 'twice put in jeopardy' for the same offense."[19] Among their protections, these clauses protect criminal defendants against multiple punishments for the same offense.[20] Whether two offenses constitute the "same offense" is determined under the "same elements" test.[21] The same elements test asks whether "each offense requires proof of elements that the other does not . . ."[22] If they do, they are not the same offense for double jeopardy purposes.[23] In determining whether each offense requires proof of an element that the other does not, this Court must look to "the statutory elements, not the particular facts of the case . . . ."[24]

Welshans was convicted of possessing a building that he knew was used to manufacture methamphetamine,[25] and possessing a building that he knew was used to manufacture a controlled substance within 500 feet of a residence.[26] MCL 333.7401c was enacted by 2000 PA 314, and originally provided in pertinent part as follows:

(1) A person shall not do any of the following:

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[18] *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). Welshans argued at his preliminary examination that simultaneously trying him under MCL 333.7401c(2)(d) and (2)(f) violated his right against double jeopardy. However, he did not renew that argument in the trial court, and consequently it is unpreserved. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011).

[19] *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002).

[20] *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003).

[21] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); *People v Baker*, 288 Mich App 378, 381; 792 NW2d 420 (2010).

[22] *Baker*, 288 Mich App at 382.

[23] *Id*.

[24] *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008).

[25] MCL 333.7401c(1)(a) and (2)(f).

[26] MCL 333.7401c(1)(a) and (2)(d).

(a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

* * *

(2) A person who violates this section is guilty of a felony punishable as follows:

(a) Except as provided in subdivisions (b) to (e), by imprisonment for not more than 10 years or a fine of not more than $100,000.00, or both.

* * *

(d) If the violation occurs within 500 feet of a residence, business establishment, school property, or church or other house of worship, by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both.

In *People v Meshell*,[27] the defendant was convicted, in relevant part, of operating or maintaining a methamphetamine laboratory under MCL 333.7401c(1)(a) and (2)(a), and operating or maintaining a methamphetamine laboratory near a residence under MCL 333.7401c(1)(a) and (2)(d). This Court held that these convictions violated double jeopardy under the same elements test.[28] The Court explained that "the elements of operating or maintaining a methamphetamine laboratory are encompassed within the elements of operating or maintaining a methamphetamine laboratory within five hundred feet of a residence . . . ."[29]

MCL 333.7401c was subsequently amended by 2003 PA 310, which went into effect on April 1, 2004. It now provides in pertinent part as follows:

(1) A person shall not do any of the following:

(a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

* * *

(2) A person who violates this section is guilty of a felony punishable as follows:

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[27] 265 Mich App 616, 618; 696 NW2d 754 (2005).

[28] *Id*. at 630.

[29] *Id*. at 631.

> (a) Except as provided in subdivisions (b) to (f), by imprisonment for not more than 10 years or a fine of not more than $100,000.00, or both.
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> * * *
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> (d) If the violation occurs within 500 feet of a residence, business establishment, school property, or church or other house of worship, by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both.
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> (f) If the violation involves or is intended to involve the manufacture of a substance described in section 7214(c)(*ii*), by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

In *People v Routley*,[30] the defendant argued for the first time in his application to the Supreme Court that his convictions under MCL 333.7401c(2)(d) and (2)(f) violated double jeopardy under the same elements test. In its order denying leave to appeal, the Court rejected this argument:

> [E]ven if defendant's double jeopardy challenge had been preserved, we would conclude that each offense requires proof that the other does not. Here, § 7401c(2)(f) requires proof that the laboratory involved "the manufacture of a substance described in section 7214(c)(ii)," which specifically proscribes only methamphetamine and "its salts, stereoisomers, and salts of stereoisomers," and § 7401c(2)(d) does not; and § 7401c(2)(d) requires proof that the laboratory was "within 500 feet of a residence," and § 7401c(2)(f) does not.[31]

Welshans relies primarily on *Meshell* in arguing that his convictions under MCL 333.7401c(2)(d) and MCL 333.7401(2)(f) violate double jeopardy. He argues that operating a methamphetamine laboratory is a necessarily included lesser offense of operating a methamphetamine laboratory within 500 feet of a residence, and that the statements in *Routley* are dicta since the Court denied leave to appeal.

Regardless of the precedential value of *Routley*, we find that it presents the correct analysis. Under the "same elements test" outlined in *Blockburger*, they are separate offenses. MCL 333.7401c(1)(a) does not refer specifically to methamphetamine. Thus, MCL 333.7401c(1)(a) and (2)(a) generally proscribe possessing a building that is used to manufacture any controlled substances, not only methamphetamine. The elements of the offenses proscribed by MCL 333.7401c(1)(a) and (2)(f) are: (1) defendant possessed a building, (2) defendant knew or should have known that a controlled substance was being manufactured in that building, and (3) such manufacturing involved methamphetamine.[32] The elements of an offense proscribed by

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[30] 485 Mich 1075, 1075-1076; 777 NW2d 160 (2010).

[31] *Id*.

[32] Welshans's reliance on *Meshell* is misplaced since it was decided under the former version of MCL 333.7401c, which did not include a subsection specifically regarding methamphetamine.

MCL 333.7401c(1)(a) and (2)(d) are (1) the defendant possessed a building, (2) the defendant knew or should have known that a controlled substance was being manufactured in that building, and (3) defendant's building was within 500 feet of a residence. Although in the present case the proofs at trial for both offenses overlapped, for purposes of double jeopardy, they were not the same offense.

Welshans was also convicted of manufacturing methamphetamine,[33] and possessing methamphetamine.[34] MCL 333.7401 provides in pertinent part as follows:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
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> * * *
>
> (b) Either of the following:
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> (*i*) A substance described in section 7212(1)(h) or 7214(c)(*ii*) is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.[35]

MCL 333.7403 provides in pertinent part as follows:

> (1) A person shall not knowingly or intentionally possess a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> * * *
>
> (b) Either of the following:
>
> (*i*) A substance described in section 7212(1)(h) or 7214(c)(*ii*) is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00, or both.[36]

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[33] MCL 333.7401(2)(b)(*i*).

[34] MCL 333.7403(2)(b)(*i*).

[35] Footnote omitted.

[36] Footnote omitted.

Welshans contends that possession of methamphetamine is a lesser included offense of manufacture of methamphetamine, and that they constitute the same offense under the *Blockburger* same elements test.

Welshans's argument is without merit, as both offenses require proof of an element that the other does not. Possession of methamphetamine requires proof that the defendant possessed methamphetamine, which manufacture of methamphetamine does not. Manufacture of methamphetamine requires proof that the defendant manufactured methamphetamine, which possession of methamphetamine does not. Consequently, the two offenses are not the same offense under our double jeopardy jurisprudence.

III. JURY INSTRUCTIONS/INEFFECTIVE ASSISTANCE OF COUNSEL

Welshans next argues that the jury was incorrectly instructed on how to consider Thomas Conley and Hartman's testimony. We find that relief is not warranted. After the trial court delivered the instructions, it asked the parties if there were any objections and Welshans's counsel replied, "No." In *People v Kowalski*,[37] our Supreme Court held that "[w]hen defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."[38] Therefore, we decline to review this issue.

Nonetheless, Welshans also argues that his trial counsel's failure to object or request the correct instructions constituted ineffective assistance of counsel. We disagree. This unpreserved issue of ineffective assistance of counsel is reviewed for errors apparent on the record.[39]

The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee the right to effective assistance of counsel for criminal defendants.[40] To establish that his counsel rendered ineffective assistance and therefore that he is entitled to a new trial Welshans "must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different."[41] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."[42]

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[37] 489 Mich 488, 503; 803 NW2d 200 (2011).

[38] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation and quotation marks omitted).

[39] *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011).

[40] *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

[41] *Id*.

[42] *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation and quotation marks omitted).

The trial court gave the "disputed accomplice" instruction[43] regarding Conley. Welshans first argues that the "undisputed accomplice" instruction,[44] should have been given because Conley admitted to taking part in the methamphetamine operation. Conley did admit that he was partially involved in manufacturing methamphetamine, testifying about several occasions when he bought Sudafed at Hartman's behest to make methamphetamine. Since there was no hearing held pursuant to *People v Ginther*,[45] it is unclear to this Court why the disputed accomplice instruction was given rather than the undisputed accomplice instruction. However, even if the "disputed accomplice" instruction would have been appropriate, this was not an error that was "so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."[46] "Jurors are presumed to follow their instructions . . . ."[47] As such, because Conley admitted to being an accomplice, the jury, following the instruction, would have treated his testimony accordingly. Thus, any error was not outcome determinative.

Welshans also argues that the trial court erroneously omitted from its delivery of M Crim JI 5.6(1) the following instruction: "You should examine an accomplice's testimony closely and be very careful about accepting it." The record shows, however, that the trial court indeed gave this instruction.

In regards to Hartman's testimony, the trial court gave neither the disputed accomplice nor the undisputed accomplice instruction. Given Hartman's admission that he had made methamphetamine, it seems that the undisputed accomplice instruction was warranted. However, without a *Ginther* hearing, it is unclear whether defense counsel's failure to request it was a strategic decision. Even assuming it was not, there has been no showing that any error was outcome determinative. Welshans's counsel communicated to the jury that it should not trust Hartman's testimony. First, Welshans's counsel effectively cross-examined Hartman. Hartman admitted that at his trial, he denied making methamphetamine, which contradicted his testimony at Welshans's trial. Hartman also admitted that he had lied to police. In his closing argument, Welshans's counsel called attention to Hartman's contradictory testimony, and argued that "he might have spite, he went down, he wants to take other people down with him . . . ." Regarding Conley and Hartman generally, Welshans's counsel also argued that they were not credible witnesses because their testimony was motivated by personal interest. The trial court also gave the general instruction on judging witness credibility. Accordingly, under the circumstances, any deficiency by defense counsel did not prejudice Welshans, so relief is not warranted.

IV. OFFENSE VARIABLE 19

[43] M Crim JI 5.5 and 5.6

[44] *Id*.

[45] 390 Mich 436; 212 NW2d 922 (1973).

[46] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citation and quotation marks omitted).

[47] *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Welshans next challenges the trial court's assessment of offense variable (OV) 19. We find that remand is necessary. "The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo."[48] "[T]he circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence."[49]

OV 19 is properly assessed 10 points if the defendant "interfered with or attempted to interfere with the administration of justice."[50] At sentencing, the prosecutor argued that Welshans should be assessed 10 points under OV 19 because he lied to the lead police officer in this case during his initial interview. The prosecutor explained that Welshans told the officer that he was unaware that Conley had been selling heroin out of Welshans's house, although at trial Welshans admitted that he knew about it. The trial court and defense counsel had the following colloquy:

> [*Defense Counsel*]: . . . I don't think there's any question that there was a misstatement to [the lead officer] when this was—when the investigation began on February 21st.
>
> *The Court*: There was a misstatement by your client?
>
> [*Defense Counsel*]: That—no, I'm not stating that.
>
> *The Court*: What's the misstatement?
>
> [*Defense Counsel*]: Misstatement that he didn't know about drugs being sold in the residence. He got up on the stand and definitively said that, yeah, I knew Ronald Hartman was selling drugs. However he didn't—my apologies, Tom Conley, I got names mixed up.
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> But nevertheless he didn't obstruct justice as to any other person. The only thing that affected was himself. At that point if you're obstructing your own investigation, anybody pleading the 5th is obstructing justice as well because they're not, you know, making one of their statements to the police.

The trial court assessed 10 points under OV 19 "because of the false statement that [Welshans] made to the police."

There is nothing in the record indicating that Welshans lied to the lead officer during his interview. The prosecution counters that the concession by Welshans's counsel was sufficient to sustain the assessment. Given the ambiguity of Welshans's counsel's position, however, we are

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[48] *People v Portellos*, 298 Mich App 431, 446; 827 NW2d 725 (2012).

[49] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[50] MCL 777.49(c).

constrained to disagree. We find that the appropriate course is to remand for further proceedings on the scoring of OV 19. If it is established by a preponderance of the evidence that Welshans intentionally misled the lead officer, the assessment of OV 19 is appropriate.[51]

V. *ALLEYNE V UNITED STATES*[52]

Finally, Welshans argues that pursuant to *Alleyne v United States*,[53] his "sentencing violates the Sixth and Fourteenth Amendments to the United States Constitution because the trial court engaged in judicial fact-finding that increased the floor of the range of permissible sentence . . . ." Welshans, however, acknowledges that this argument was rejected by this Court in *People v Herron*,[54] which we are bound to follow.[55] Thus, his argument must fail.

We affirm Welshans's convictions and remand for further proceedings regarding the scoring of OV 19. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

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[51] See *Hardy*, 494 Mich at 438.

[52] ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

[53] *Id*.

[54] 303 Mich App 392, 399; 845 NW2d 533 (2013), app held in abeyance 846 NW2d 924 (2014).

[55] MCR 7.215(J)(1).